United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	**Docket No. 17-1082**
	)	**Issued: September 6, 2017**
DEPARTMENT OF THE NAVY, NAVAL AVIATION DEPOT, Pensacola, FL, Employer	)	

Appearances:
David G. Jennings, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 24, 2017 appellant, through counsel, filed a timely appeal from a March 22, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

ISSUE

The issue is whether appellant has more than 17 percent binaural (both ears) hearing loss for which he previously received a schedule award.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 19, 2016 appellant, then a 55-year-old performance assessment representative, filed an occupational disease claim (Form CA-2) alleging permanent hearing loss due to noise exposure at work. He first became aware of his hearing loss and realized that it was causally related to his federal employment on January 1, 1990. Appellant was last exposed to conditions alleged to have caused his disease or illness on September 14, 1996.

Appellant submitted an undated statement which listed his federal civilian noise exposure. From May 2008 to the present he worked at the Naval Facilities Engineering Command as a performance assessment representative and had no noise exposure. From 1996 to 2008 appellant worked for the Defense Financial and Accounting Service as an accounting technician, financial management analyst, and facility operations specialist. During this time he had no noise exposure. From November 1980 to 1996 appellant worked for the Naval Aviation Depot as a sheet metal mechanic. He was exposed to noise from various pneumatic tools, rivet guns, shrinker, stretcher, turret punches, power brakes, shears, hand rollers, band saws, jigs, belt sanders, and disk sanders for 40 hours per week. Ear plugs and muffs were used. From September 1979 to 1980 appellant worked for General Electric as a lineman and was exposed to noise from aircraft taxiing to and from the runway. He used ear plugs and ear muffs for hearing protection. From June to September 1979 appellant worked at Pensacola Greyhound Racing as a lead-out and had no exposure to noise. From December 1978 to 1979 he worked at 7-11 as a stock clerk and had no noise exposure. From 1977 to November 1978 appellant worked at Coastal Aviation Inc., as a part-time lineman. During this time he was exposed to noise from aircraft taxiing to and from the runway, for one to two hours a day. Appellant used ear plugs and muffs for hearing protection.

The records reveals that appellant was enrolled in the employing establishment's hearing conservation program.

Appellant submitted an audiogram dated January 28, 2016 signed by an audiologist, which diagnosed bilateral sensorineural hearing loss. The audiologist recommended appellant consider amplification.

By letter dated October 26, 2016, OWCP advised appellant and the employing establishment of the type of evidence needed to establish the claim.

Appellant submitted a response to OWCP's factual development questionnaire and reiterated his noise exposure history noted above. He reported that he did not have hobbies which involved loud noise. Appellant noted that his last exposure to hazardous noise was in 1996 and he had not filed a hearing loss claim before. He indicated that he first noticed his hearing loss in 1990 and realized it was related to his employment in 1990. Appellant did not believe that his hearing loss could be due to anything other than work-related noise exposure.

Counsel provided several employing establishment audiograms dated November 4, 1980 to August 29, 1996, which showed progressive bilateral sensorineural hearing loss.

OWCP prepared a December 6, 2016 statement of accepted facts (SOAF) noting appellant's employment and noise exposure history. The extent of the exposure to occupational noise during his tenure in his position was not challenged by the employing establishment.

On December 6, 2016 OWCP referred appellant, together with a SOAF, to Dr. Kimberly A. Donnellan, a Board-certified otolaryngologist, for an otologic examination and an audiological evaluation.

In a January 4, 2017 report, Dr. Donnellan noted examining appellant and referenced his exposure to workplace noise. She noted that he worked at the employing establishment starting in November 1980. Dr. Donnellan noted significant aviation noise exposure eight hours a day and indicated that appellant reported tinnitus in 1986. She noted that his ear canals and drums were clear without rupture, drum motility was intact, and the Weber and Rinnie midline test revealed air conduction to be greater than bone conduction. Dr. Donnellan noted findings of asymmetry and indicated that a magnetic resonance imaging (MRI) scan might be considered to rule out acoustic neuroma. She diagnosed mild sensorineural hearing loss in the right ear and mixed moderate hearing loss in the left ear with tympanometry compliance on clinical examination. Dr. Donnellan noted that the sensorineural hearing loss was in part or all due to noise exposure encountered in appellant's federal civilian employment. She recommended hearing aids, nasal steroid spray for the mixed component of hearing loss, and an MRI scan. Audiometric testing was performed for Dr. Donnellan on January 4, 2017. Testing at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed the following: right ear 25, 25, 35, and 50 decibels; left ear 45, 50, 45, and 65 decibels.

On February 27, 2017 an OWCP medical adviser reviewed Dr. Donnellan's January 4, 2017 report and the audiometric testing. He concluded that, in accordance with the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,[3] (A.M.A., *Guides*), appellant had 17.33 percent binaural hearing loss and referenced an attached worksheet. The medical adviser noted that testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 25, 35, and 50, respectively. He totaled the decibels at 135 and divided by 4 to obtain an average hearing loss at those cycles of 33.75 decibels. The medical adviser indicated that the average of 33.75 decibels was then reduced by 25 decibels, pursuant to the calculation formula, to equal 8.75 percent hearing loss for the right ear which he multiplied by the established factor of 1.5 and computed a 13 percent monaural loss of hearing for the right ear. He noted that testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibels losses of 45, 50, 45, and 65 respectively. The medical adviser totaled the decibels at 205 and divided them by four and calculated an average hearing loss at those cycles of 51 decibels. The average of 51 decibels was reduced by 25 decibels to 26 which he multiplied by the established factor of 1.5 to compute a 39 percent hearing loss for the left ear. He multiplied the lesser loss of 13 by five, then added to the greater loss of 39 and the total, 104, was divided by six for a binaural hearing loss of 17.33 percent. The medical adviser rounded 17.33 percent to 17 percent binaural hearing loss. He indicated that the date of maximum medical improvement was January 4, 2017. The medical adviser recommended that hearing aids be authorized.

[3] A.M.A., *Guides* (6th ed. 2009).

On February 28, 2017 OWCP accepted that appellant's claim was timely filed. It further accepted the claim for bilateral sensorineural hearing loss due to noise exposure.

On March 16, 2017 appellant filed a claim for a schedule award (Form CA-7).

By decision dated March 22, 2017, OWCP granted appellant a schedule award, finding that he had 17 percent binaural hearing loss. The award was for 34 weeks of compensation, covering the period January 24 to August 29, 2017.

LEGAL PRECEDENT

The schedule award provisions of FECA[4] and its implementing regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[6]

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.[7] Using the frequencies of 500, 1,000, 2,000, and 3,000 cycles per second, the losses at each frequency are added up and averaged.[8] Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions.[9] The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss.[10] The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss.[11] The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.[12]

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404 (1999).

[6] *Id. See also Jacqueline S. Harris,* 54 ECAB 139 (2002).

[7] A.M.A., *Guides* at 250 (6th ed. 2009).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Donald E. Stockstad,* 53 ECAB 301 (2002), *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

OWCP procedures provide that, after obtaining all necessary medical evidence, the file should be routed to OWCP's medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[13] It may follow the advice of its medical adviser or consultant where he or she has properly utilized the A.M.A., *Guides*.[14]

ANALYSIS

Based on the report of the second opinion specialist, Dr. Donnellan, OWCP accepted that appellant sustained bilateral hearing loss due to noise exposure from his federal employment. An OWCP medical adviser applied OWCP's standardized procedures to the January 4, 2017 audiogram performed for Dr. Donnellan in calculating permanent impairment. The Board notes that testing for the right ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 25, 25, 35, and 50, respectively. These decibels were totaled at 135 and were divided by 4 to obtain an average hearing loss at those cycles of 33.75 decibels. The average of 33.75 decibels is then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to equal 8.75 percent hearing loss for the right ear which is multiplied by the established factor of 1.5 to compute a 13.125 percent monaural loss of hearing for the right ear. However, the Board notes that the medical adviser incorrectly rounded the monaural hearing loss to 13 percent. OWCP procedures provide that, in calculating a binaural loss, percentages should not be rounded until the final percent for award purposes is obtained.[15] Testing for the left ear at the frequency levels of 500, 1,000, 2,000, and 3,000 cycles per second revealed decibel losses of 45, 50, 45, and 65 respectively. These decibels were totaled at 205 and when divided by 4 to obtain the average hearing loss at those cycles of 51.25 decibels. However, the medical adviser incorrectly calculated the average hearing loss at 51 decibels. The Board notes that the average of 51.25 decibels is then reduced by 25 decibels (the first 25 decibels were discounted as discussed above) to 26.25 which is multiplied by the established factor of 1.5 to compute a 39.375 percent hearing loss for the left ear. The lesser loss of 13.125 is multiplied by 5, then added to the greater loss of 39.375 and the total, 105, is divided by 6 to arrive at the amount of the binaural hearing loss of 17.5 percent which, under OWCP procedures, is rounded to 18 percent binaural hearing loss.[16] This revised calculation would provide appellant with a greater impairment rating than that which was previously granted.

The Board, therefore, finds that under OWCP's procedures, the medical evidence establishes that appellant has 18 percent binaural permanent impairment of his hearing.

[13] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(f) (February 2013).

[14] *See Ronald J. Pavlik*, 33 ECAB 1596 (1982).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.4(b)(2)(b) (January 2010).

[16] *See id.* at Chapter 3.700.3(b) (January 2010) (results should be rounded down for figures less than .5 and up for .5 and over).

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing a progression of employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has 18 percent permanent binaural (both) hearing loss.

ORDER

IT IS HEREBY ORDERED THAT the March 22, 2017 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 6, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board